93-697

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SNAP-ON TOOLS CORPORATION, TIM KASH, and RAY PARK,

Petitioners,

v.

DAN EULRICH, VIRGINIA EULRICH, and DEPARTMENT OF JUSTICE OF THE STATE OF OREGON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Oregon's absolute prohibition of any judicial review of a jury's punitive damages award for excessiveness violates the Due Process Clause.

LIST OF PARTIES

Only those parties identified in the caption to this petition were parties in the Court of Appeals and Supreme Court of Oregon. One additional party, Paul Hutchins, was named as a defendant in the trial court but did not participate in the appeal and is not a party to this petition.

RULE 29.1 LISTING

Snap-on Tools Corporation has no parent company and no subsidiaries that are not wholly-owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.1 LISTING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. OREGON'S PROHIBITION OF POST-TRIAL REVIEW OF PUNITIVE DAMAGE AWARDS VIOLATES THE DUE PROCESS CLAUSE 5

II. RESPONDENTS HAVE NO COUNTERARGUMENT 7

CONCLUSION 9

APPENDIX A-1

1. OPINION OF COURT OF APPEALS REJECTING DUE PROCESS ARGUMENTS A-1

2. ORDER OF SUPREME COURT OF OREGON DENYING PETITION FOR REVIEW A-31

3. ORDER OF COURT OF APPEALS DENYING RECONSIDERATION A-32

4. ORDER OF TRIAL COURT DENYING POST-TRIAL MOTIONS A-34

TABLE OF CONTENTS – Continued

Page

5. MONEY JUDGMENT OF TRIAL COURT.....A-36

6. AMENDED MONEY JUDGMENT OF TRIAL COURT..... A-39

7. OPINION OF COURT OF APPEALS REGARDING FINALITY.....A-43

8. PORTION OF POST-TRIAL MOTIONS..... A-46

9. PORTION OF BRIEF IN SUPPORT OF POST-TRIAL MOTIONS..... A-48

10. PORTION OF BRIEF FILED WITH COURT OF APPEALS OF OREGON..... A-51

11. PORTION OF PETITION FOR REVIEW TO THE SUPREME COURT OF OREGON.....A-54

12. JURY INSTRUCTIONS REGARDING PUNITIVE DAMAGES.....A-57

TABLE OF AUTHORITIES

Page

CASES

Adams v. Murakami, 813 P.2d 1348 (Cal. 1991) (in bank) 6

Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992) 7

Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) 6

Herman v. Sunshine Chemical Specialties, Inc., 627 A.2d 1081 (N.J. 1993) 6

Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) 7

Kinard v. Crosby, 433 S.E.2d 835 (S.C. 1993) 6

Oberg v. Honda Motor Co., 814 P.2d 517 (Or. App. 1991) 4, 7

Oberg v. Honda Motor Co., 851 P.2d 1084 (Or. 1993) (in bank) 2, 3, 5

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 1, 4, 5

Van Lom v. Schneiderman, 210 P.2d 461 (Or. 1949) *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV, § 1 1

Or. Const. art. VII, § 3 (amended 1910) 2

OPINIONS BELOW

The opinion of the Court of Appeals of Oregon, 121 Or. App. 25, 853 P.2d 1350, appears in the Appendix (App.) at A-1; its unreported denial of reconsideration in App. at A-32; and its opinion regarding finality, 103 Or. App. 610, 798 P.2d 715, in App. at A-43. The unreported denial of petition for review by the Supreme Court of Oregon appears in App. at A-31; the unreported money judgment and amended money judgment of the trial court in App. at A-36; and the trial court's unreported order denying post-trial motions in App. at A-34.

JURISDICTIONAL GROUNDS

The Court of Appeals of Oregon rejected petitioners' due process arguments June 9, 1993 and denied reconsideration August 11, 1993 (despite citation in the petition of the intervening June 25, 1993 decision in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993)).

The Supreme Court of Oregon, to which the new *TXO* decision was also cited, denied petition for review on September 21, 1993. The jurisdiction of the Court is involved under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Oregon Constitution art. VII, § 3 (amended 1910) provides in pertinent part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

STATEMENT OF THE CASE

Oregon courts have been absolutely prohibited from conducting post-trial review of a jury's punitive damages award for excessiveness since *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949), recently reaffirmed in *Oberg v. Honda Motor Co.*, 851 P.2d 1084 (Or. 1993) (in bank), *petition for cert. filed*, No. 93-644 (U.S. Oct. 25, 1993).[1] *Van Lom* and *Oberg* rely on the provision of the Oregon Constitution, Article VII, section 3, which provides:

> [N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

As a result, post-trial review of punitive damages is limited to determining whether there was trial error and

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[1] The petition for certiorari in that case, filed by Honda Motor Co. on October 25, 1993, raises the same issue as does this one.

whether "no evidence supports the verdict." Oregon courts refuse to review whether the amount awarded is excessive. *Van Lom*, 210 P.2d at 468-71; *Oberg*, 851 P.2d at 1091 n.7.

Petitioner Snap-on Tools Corporation, a tool manufacturer, acting through managers, petitioners Tim Kash and Ray Park, signed a dealership agreement with respondent Dan Eulrich. He and his wife, respondent Virginia Eulrich, sought punitive damages alleging (a) fraud in the inducement of the dealership agreement, and (b) tortious breach of the implied covenant of good faith and fair dealing in relation to the agreement.

In his year as a dealer, Eulrich did not make as much money as he claims he was told he could earn. According to his own proof, Eulrich suffered an out-of-pocket loss of no more than $10,000. The jury returned a verdict of $100,000 in compensatory damages on both counts (stipulated to be alternative grounds for the same compensatory damages). As to the fraud claim, the jury awarded $4.75 million in punitive damages, jointly and severally, against Snap-on, Park, and Kash, *i.e.*, the same amount was awarded against Park and Kash, individual wage earners, as their Fortune 500 employer. As to the tortious breach claim, which under the instructions necessarily was based on at least the same evidence as the fraud claim and more, the jury awarded $3.7 million in punitive damages and the court combined these into a total punitive damages award against Snap-on of $8.45 million.

On the amount of punitive damages, the jury was instructed only that it had discretion to determine the amount and that, in doing so, it "may" consider four

factors: "the character of defendants' conduct"; "defendants' motive"; "the sum of money that would be required to discourage the defendants and others from engaging in such conduct in the future"; and "the income and assets of the defendant."[2]

Petitioners filed a timely post-trial motion claiming, among other things, that the rule prohibiting post-trial review of excessiveness violated due process.[3] The motion was denied (App. at A-34) and petitioners appealed. On June 9, 1993, the Court of Appeals affirmed the punitive damages award, without discussion, simply relying on its prior opinion in *Oberg v. Honda Motor Co.*, 814 P.2d 517, *aff'd*, 851 P.2d 1084 (Or. May 20, 1993), *petition for cert. filed*, No. 93-644 (U.S. Oct. 25, 1993). (App. at A-24 to A-25) Shortly thereafter came *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (June 25, 1993). Petitioners sought reconsideration by the Court of Appeals and review by the Oregon Supreme Court in light of *TXO*, on the ground that all opinions there required some form of post-trial review for excessiveness. Both courts refused further review. (App. at A-31, A-32)

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[2] The relevant jury instructions are reprinted in App. at A-57.

[3] Thereafter, the Department of Justice of the State of Oregon intervened in the case to claim a share of the punitive damages award pursuant to *Or. Rev. Stat.* § 18.540 (1988). Whether the state is entitled to any share of the award has not been decided. The Court of Appeals determined that the Department's intervention petition has no impact on the finality of the judgment against petitioners. (App. at A-43) Portions of the record where petitioners raised their due process claims are reprinted in App. beginning at A-46.

REASONS FOR GRANTING THE WRIT

I. OREGON'S PROHIBITION OF POST-TRIAL REVIEW OF PUNITIVE DAMAGE AWARDS VIOLATES THE DUE PROCESS CLAUSE.

As its courts recognize, Oregon stands alone among the states in prohibiting judicial review of punitive damages awards. *Van Lom v. Schneiderman*, 210 P.2d 461, 471 (Or. 1949). In Oregon, juries have essentially unlimited discretion in setting punitive damages,[4] while its courts refuse to conduct any post-trial review to determine whether an award is excessive.

After *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the Oregon Supreme Court twice declined to reconsider the prohibition against post-trial review (in *Oberg* and this case). As the Oregon Supreme Court views it, due process is satisfied by pre-verdict procedures such as adequate jury instructions. *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1096 (Or. 1993). Post-trial review of excessiveness will not be required in Oregon unless the Court takes this case.

Oregon's procedure – and its recent actions – flatly ignore *all* of the opinions in *TXO*. There the four-justice plurality and two justices in the dissent found that the Due Process Clause sets substantive limits beyond which punitive damages cannot be awarded. 113 S. Ct. at 2718-20, 2724-26, 2731. Since excessiveness can only be reviewed after a jury verdict, this substantive due process

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[4] In products liability cases, such as *Oberg*, certain limited statutory instructions must be given. In other cases, including this one, there is not even that requirement.

right can only be protected by adequate post-trial review. Even the opinion of Justice Scalia, joined in by Justice Thomas, which gave the most deference to state courts, still agreed with the bedrock minimum that "procedural due process requires judicial review of punitive damages awards for reasonableness." *Id.* at 2727. All the other justices recognized that minimum requirement either expressly, *id.* at 2740-42, or by reviewing the post-trial review procedures applied to determine if they were adequate, *id.* at 2723-24.

Thus, although other issues may remain in dispute, all nine justices have clearly agreed that due process requires at least some post-trial review of reasonableness of punitive damages. For Oregon simply to ignore that unanimous view means that Oregon courts will continue to violate due process in hundreds of cases annually until the Court grants certiorari in an Oregon case.

Every appellate court except those in Oregon that has interpreted *TXO* (and its predecessor cases) has understood due process to require post-trial review on the issue of reasonableness. *E.g., Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) (examining post-verdict procedures at trial and appellate court levels); *Herman v. Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1085-86 (N.J. 1993) ("At a minimum, due process requires appellate review of the award for reasonableness"); *Adams v. Murakami*, 813 P.2d 1348, 1356 (Cal. 1991) (in bank) ("At a minimum . . . the high court has made a clear constitutional mandate for meaningful judicial scrutiny of punitive damages awards"); *Kinard v. Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) (holding that due process requires trial and appellate court review of the reasonableness of punitive damages

awards); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992) (establishing new procedures for post-verdict review of punitive damages awards to ensure compliance with due process); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc.*, 596 A.2d 687, 709-12 (Md. Ct. Spec. App. 1991) (same), *cert. denied*, 605 A.2d 137 (Md. 1992).

There are two ways to rectify the situation in Oregon. Most directly, Oregon can bar punitive damages until its state constitution is amended to allow what is required by federal due process. Alternatively, the Oregon Supreme Court can reinterpret its constitution in light of new constitutional cases to avoid violating the Due Process Clause as it is currently interpreted. For example, it could decide to adopt the partly concurring and dissenting opinion in *Van Lom*, 210 P.2d at 474-76, which construed the Oregon Constitution not to prohibit review for excessiveness. Accordingly, the Court could, upon reversal, remand the present case to give Oregon an opportunity to bring Oregon into line with due process requirements.

II. RESPONDENTS HAVE NO COUNTERARGUMENT.

Below, respondents essentially gave up when trying to confront the above arguments except to assert that *Oberg* pronounced the law of Oregon. They also urged (more accurately asserted) that the due process challenge was waived or that the punitive damages award was not excessive. Both points are so frivolous that they warrant only a short anticipatory reply here.

No lower court found waiver. The Court of Appeals ruled on the due process issue raised. Eulrich concedes petitioners raised the due process issue in their post-trial motion, which explicitly challenged the excessiveness of the award. (*See* App. at A-46 to A-50) Eulrich only claims that petitioners were required to raise the verdict's excessiveness and the right to be heard thereon post-trial *before* the verdict was returned, a position supported by no Oregon (or other) precedent.

Eulrich also argued that the award could not be considered excessive (an issue none of the lower courts considered because of the prohibition against review). However, Eulrich was a dealer for only one year and suffered out-of-pocket damages (by his own proof) of no more than $10,000. The jury gave him $100,000, five times what he earned in the best year of his life, and then added a punitive damages award against Snap-on of 84.5 times the compensatory damage award (845 times the out-of-pocket loss). Despite being told it "may" consider the defendants' ability to pay, the jury imposed the same $4.75 million for the fraud count on Park and Kash, individual wage-earners, as it did on Snap-on, a Fortune 500 Company. The jury then decided to punish Snap-on twice with a second, smaller punitive award, involving (necessarily under the instructions) the same conduct. Whether or not petitioners should ultimately prevail on this evidence is not before the Court. All that is at issue is whether petitioners should have had a right to a hearing on the issue of excessiveness.

That respondents could make no better arguments than these is itself revealing on the merits of Oregon's procedure.

CONCLUSION

For the reasons stated above, the Court should grant this petition for a writ of certiorari to review whether a total prohibition of post-trial review of punitive damages awards for excessiveness is consistent with the Due Process Clause.

Respectfully submitted,

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APPENDIX

Dan EULRICH and Virginia Eulrich, husband and wife, Respondents-Cross-Appellants,

and

Department of Justice, Intervenor-Respondent,

v.

SNAP-ON TOOLS CORPORATION, a Delaware corporation; Tim Kash, individually and as a Supervisor of Snap-On Tools Corporation; Ray Park, individually and as a Supervisor of Snap-On Tools Corporation, Appellants-Cross-Respondents, and Paul Hutchins, individually and as a Supervisor of Snap-On Tools Corporation, Defendant.

88-0708; CA A64027.

Court of Appeals of Oregon,
Argued and Submitted Dec. 18, 1991.
Decided June 9, 1993.

121 Or. App. 25, 853 P.2d 1350

Before WARREN, P.J., and RIGGS and EDMONDS, JJ.

RIGGS, Judge.

Defendants[1] appeal from a judgment entered on a verdict for plaintiff[2] in this case involving a Snap-On Tools dealership and its termination. Plaintiff cross-appeals.

Plaintiff's claims of damages for fraud, breach of good faith and fair dealing and breach of contract arise out of a 1986 dealership agreement under which plaintiff sold Snap-On tools. We state the facts and draw inferences in a manner most favorable to plaintiff.[3]

Defendant Snap-On is a company that manufactures and sells hand tools to a nationwide network of dealers who in turn sell them to professional mechanics. Each dealer is assigned a marketing territory. There was evidence that the marketing system was designed to provide a maximum number of potential dealers and profit for Snap-On while often providing inadequate revenue to support the dealers. As a consequence, dealers quickly

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[1] Defendants are Snap-On Tools Corporation and its supervisors, Kash and Park. A third supervisor is not involved in this appeal. We will refer to the corporation as Snap-On and to the individual defendants by their names. "Defendants" will refer to the corporation and the individuals together.

[2] There are two plaintiffs, Dan and Virginia Eulrich. Their claims are identical. Because all of the material facts relate only to Dan, for ease of reference we will refer throughout this opinion to him as plaintiff. We recognize that Virginia's arguments are the same as Dan's.

[3] Because defendants' first assignment of error arises from the denial of defendants' motion for a directed verdict, we view the facts, including inferences, in the light most favorable to plaintiff, the non-moving party. *Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984); *Paulson v. Western Life Insurance Co.*, 292 Or. 38, 40 n. 1, 636 P.2d 935 (1981).

fail and are replaced by new recruits who build from the business developed by the failed dealers.

Before he became a Snap-On dealer, plaintiff was an auto body mechanic; he had never operated a business. He initially invested approximately $22,000 in inventory and accounts, which came from his savings. In addition, he promised to pay a balance of $22,500 from sales of inventory. Defendants fraudulently induced plaintiff to enter into the dealership agreement by misrepresenting to him the earning potential of the dealership. Defendants misrepresented the adequacy of the sales territory to support the dealership, and badgered him into making marginal sales and over-extending credit to his customers, for which plaintiff was personally liable. From the start, plaintiff's dealership was not profitable. Plaintiff's supervisors, defendants Kash and Park, continually berated plaintiff into believing that his business failure was his own fault rather than the fault of Snap-On's marketing system, and insisted that anyone could succeed as a dealer merely by following Snap-On's sales program. Kash and Park demoralized plaintiff by denigrating his business ability in front of his wife and a large group of dealers.

In early 1987, plaintiff unsuccessfully attempted to get a more profitable territory, because his territory was not supporting him. He was told to work the territory harder. By spring, 1987, plaintiff was financially ruined. He told Kash and Park that he was out of money and that he wanted to exercise his rights under the dealership agreement and terminate his dealership. Beginning in April, 1987, he made numerous attempts to get Kash and Park to "check in" his truck, which he understood would

involve taking an inventory of tools and would allow him to receive a refund for the tools and the equity in his van. Because the dealership business had depleted his personal finances, plaintiff needed the money from the tools and the equity in the van to pay his household bills. Kash and Park repeatedly put off the check-in until June 1. By that time, as they knew, plaintiff was in serious financial difficulty and could not pay his living expenses. They also knew that plaintiff's wife was extremely ill with toxemia related to her first pregnancy and required hospitalization. Plaintiff and his wife had no medical insurance and her medical bills made their financial situation even more precarious.

When plaintiff took his van to Portland to check it in, he arrived at 8 or 9 a.m. He and Kash worked for five or six hours to unload and inventory the van. During that time, Kash did not make conversation with him, and his attitude was "not kind at all." After the inventory was completed, plaintiff was told to haul the boxes into the building. By this time, plaintiff was physically tired and emotionally drained. Kash and Park had plaintiff come into Park's office to "do paperwork." They had not explained to plaintiff before then that he would have to sign numerous documents to terminate the dealership. Although they had known for nearly two months that he wanted to terminate, they had not sent the documents to him in advance to look over before he checked in the van. In the office, Kash and Park continued to berate plaintiff about being a failure, and Park "hollered" at plaintiff about "how sloppy a business practice" he operated and that "a good dealer wouldn't do business the way" plaintiff did. They handed plaintiff "quite a few" documents to

sign. Plaintiff testified that Kash and Park would hand him a piece of paper and tell him to sign it and that he did not have a chance to read through all of the papers. He did not take time to read the papers because he was uncomfortable in the hostile environment. Kash told plaintiff that he had to sign the papers before he could get any money. When he asked when he would get a check, Park told him that there would be no checks until the inventory was done and all the papers were signed. By this time, plaintiff just wanted to sign the papers and leave.

Included in the papers that plaintiff signed was a "Termination Agreement." It consists of five numbered paragraphs on one page and includes an agreement by Snap-On to repurchase plaintiff's tool inventory at current dealer cost. The fifth paragraph is a release of claims. Plaintiff did not know at that time that he had legal claims against defendants.

Defendants assert that all of plaintiff's claims are barred by the release, which provides: "Except as provided above, each party to this Agreement waives any and all claims it may have against the other arising out of the Dealership terminated by this Agreement and acknowledges that fair consideration has been given. This paragraph is intended to apply and extend to any agents, representatives, officers or employees of either party to this Agreement." Plaintiff seeks rescission of the release, claiming mistake, undue influence, lack of consideration, adhesion and economic duress. He acknowledges that, if the release is not rescinded, all of his claims for damages are barred. The trial court allowed the rescission, and the

jury awarded plaintiff general and punitive damages on all claims in the amount of $8,912,000.

Defendants' first two assignments of error challenge the trial court's denial of their motion for directed verdict on all claims, based on the release, and its entry of judgment for plaintiff on his rescission claim. We review the rescission claim *de novo*. *Gardner v. Meiling*, 280 Or. 665, 671, 572 P.2d 1012 (1977). We conclude that plaintiff is entitled to rescind the release and that, therefore the trial court did not err in denying defendants' motion for directed verdict.

A party seeking to rescind an agreement must prove the claim for rescission by clear and convincing evidence. *See Erwin and Erwin*, 100 Or.App. 64, 67, 784 P.2d 1109 (1990). Plaintiff asserts that the release should be rescinded because it was executed under economic duress. The gravamen of a claim of economic duress is that, as a result of some wrongful act by one party, the other party is deprived of free will in entering into the agreement. *See Capps v. Georgia-Pacific*, 253 Or. 248, 453 P.2d 935 (1969). Plaintiff must prove (1) wrongful acts or threats, (2) financial distress caused by those wrongful acts or threats, and (3) the absence of any reasonable alternative to the terms presented by defendants. *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or.App. 131, 142, 683 P.2d 95 (1984).

Defendants argue that the pertinent inquiry is whether the conduct that resulted in the signing of the termination agreement, which contained the release, was wrongful. They argue that we should look only at defendants' threat not to repurchase the tools and that, because

the dealership agreement did not require defendants to buy back plaintiff's tools, there was nothing legally wrongful in that conduct. That inquiry is too narrow.[4]

In determining whether there was economic duress, a court must consider all of the surrounding factors and circumstances. *Capps v. Georgia-Pacific, supra,* 253 Or. at 257, 453 P.2d 935. Among the factors and circumstances that a court considers are " 'the age and mental ability of the party seeking to avoid the transaction, his financial condition, the absence of good faith and reasonable belief by the other party making the demand that he has a good defense or a good cause of action, the adequacy of the

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[4] Even if the dissent's narrow approach is taken and we look only at defendants' acts at the time that the termination agreement was executed, requiring plaintiff to sign the termination agreement in order to receive payment for the tools was a wrongful act. The contract conditioned repurchase of the tools on defendants' consent, but defendants' performance of the contract term is subject to the duty of good faith and fair dealing. *Sheets v. Knight*, 308 Or. 220, 779 P.2d 1000 (1989); *CH2M Hill Northwest, Inc. v. Parktel I, Inc.*, 107 Or.App. 461, 465, 812 P.2d 840 (1991). "A threat is improper if * * * the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient." Restatement (Second) of Contracts § 176(1)(d) (1984). A threat may be a breach of the duty of good faith and fair dealing under the contract even if the threatened act is not itself a breach of the contract. Restatement (Second) of Contracts § 176, comment e. "[I]n the context of duress, an act or threat is wrongful if it is 'an abuse of the powers of the party making the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given.' " Calamari & Perillo, Contracts § 9-3 (3d ed. 1987). Defendants had no right to abuse their power to consent under the contract by threatening to withhold consent unless plaintiff executed another contract releasing all claims.

consideration passing between the parties, and the adequacy of the legal remedy afforded by the courts.' " *Capps v. Georgia-Pacific, supra,* 253 Or. at 256, 453 P.2d 935 (quoting *Manno v. Mutual Ben. Health & Accident Assoc.,* 18 Misc.2d 80, 187 N.Y.S.2d 709, 713 (1959)). (Emphasis deleted.) Under allegations strikingly similar to the facts of this case, the Supreme Court in *Capps* concluded that the plaintiff had stated a defense of economic duress. 253 Or. at 257, 453 P.2d 935.

Here, there was evidence that defendants' actions, up to the time the termination agreement was signed, were fraudulent and caused plaintiff's economic distress. Defendants knowingly engaged in an ongoing scheme to induce plaintiff into the business, to deny him an adequate sales territory to support his business, to browbeat and demoralize him into believing that the failure of the business was his fault rather than that of the inadequate design of the marketing system, and by depleting all of his financial resources. Defendants knew that their ongoing scheme was causing plaintiff financial distress, resulting in a lack of resources to meet daily household needs and his wife's medical needs. Despite this knowledge, and the provision in the dealer agreement that allowed either party to terminate the agreement on written notification, and despite plaintiff's numerous attempts to return the van and tools for a refund, defendants made plaintiff wait six or seven weeks to terminate the agreement.

Even if the threat not to repurchase the tools unless plaintiff signed the termination agreement was not wrongful in and of itself, defendants engaged in other

wrongful acts that, taken together with all the circumstances of this case, made the threat wrongful. "A threat is improper if the resulting exchange is not on fair terms, and * * * the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat * * * ." Restatement (Second) Contracts § 176(2)(b). There is very little question that the exchange was not on fair terms. Defendants had already promised to buy back plaintiff's tools at the price he had originally paid for them. As part of the termination agreement, defendants agreed to repurchase plaintiff's tools at current dealer costs and plaintiff received credit for his inventory in the amount of $38,377. Our review of the record does not reveal any quantification of the difference between that amount and what he would have received if he had been reimbursed at his original cost. Nevertheless, whatever that difference was, it was substantially less than the value of the claims plaintiff released in exchange. Furthermore, the effectiveness of defendants' threat not to repurchase the tools was significantly increased by their prior unfair dealing, which was designed to coerce the release of all claims against them. In the light of all the circumstances leading to the signing of the termination agreement, we conclude that defendants' conduct was wrongful.

Nevertheless, defendants argue that there was no economic duress, because plaintiff had reasonable alternatives to signing the release. They contend that, under the dealership agreement, plaintiff had the option of keeping the inventory and selling it outside the dealership, which would have allowed him to recoup his inventory investment, or that he could have refused to sign the

agreement, reserving his rights, or could have taken the termination agreement home with him and sought legal advice before he signed it. Under the coercive circumstances present here, those were not reasonable alternatives. The test is whether, given a choice between doing what defendants required or not doing it, was there a reasonable third alternative and, if there was, whether a reasonably prudent person would have taken the alternative course. *Leeper v. Beltrami*, 53 Cal.2d 195, 1 Cal.Rptr. 12, 19, 347 P.2d 12, 19 (1959).

Plaintiff had tried in vain for nearly two months to check in his van and tools and obtain the refund that defendants had promised for the tools. During that time, his poor financial situation deteriorated further. Selling Snap-On's product was a losing proposition; it would not have been a reasonable alternative for him to continue that course as a way of recouping his investment. Neither was refusing to sign the termination agreement and seeking a legal remedy a reasonable alternative. By the time defendants finally allowed plaintiff to check in the tools for the promised refund, plaintiff needed money immediately, and defendants knew it. For a legal remedy to be a reasonable alternative, it must be an "immediate and adequate remedy," and whether a remedy is "immediate and adequate" is tested by a practical standard that takes into consideration the exigencies of the situation. *Capps v. Georgia-Pacific, supra*, 253 Or. at 255, 453 P.2d 935. *See also* Calamari & Perillo, Contracts § 9-2 and 9-6; Restatement (Second) Contracts § 175, comment b. As in *Capps v. Georgia-Pacific, supra*, refusing to sign defendants' termination agreement and commencing legal action against them was not a reasonable alternative, because such a

course would have taken time and plaintiff's financial condition was perilous. Faced with the choice between complying with defendants' demand and receiving the badly needed funds, or refusing to sign and facing financial disaster, plaintiff had no reasonable alternative and thus found himself deprived of the exercise of his free will. Accordingly, we conclude that his agreement to the release was a result of economic duress and that the trial court did not err in allowing the rescission.[5]

Defendants' next four assignments of error concern plaintiff's claim for tort damages based on defendants' breach of the covenant of good faith and fair dealing. Defendants assert that the trial court erred in denying their motions for judgment on the pleadings and for a directed verdict on that claim, because there is no tort remedy for breach of the covenant of good faith and fair dealing that is implied in every contract. That argument mischaracterizes plaintiffs' claim. Plaintiff claims that a *special relationship* existed between the parties and that, from that relationship, a duty of good faith and fair dealing arose that was separate from the contractual duties. Defendants also assert that, even if such a tort exists, the trial court erred in denying their motion for a directed verdict on the claim for lack of evidence of a special relationship and in overruling defendants' objection to submitting the issue to the jury.

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[5] Because we decide that the release should be rescinded on the ground of economic coercion, we do not reach plaintiff's arguments that the release should be rescinded on the grounds of mistake, undue influence, lack of consideration or adhesion.

Defendants rely on *Georgetown Realty v. The Home Ins. Co.*, 102 Or.App. 611, 796 P.2d 651 (1990), for their argument that there is no tort remedy for breach of the duty of good faith and fair dealing. In that case, we held that the plaintiff's claim for damages for the defendant insurer's breach of its fiduciary duty could not be asserted as a tort claim. The Supreme Court reversed our opinion and held that the plaintiff could bring the claim in tort. 313 Or. 97, 111, 831 P.2d 7 (1992). The court first summarized the general principles applicable to this question: "The lesson to be drawn from this court's cases discussing the choice between contract and tort remedies is this: When the relationship involved is between contracting parties, and the gravamen of the complaint is that one party caused damage to the other by negligently performing its obligations under the contract, then, and even though the relationship between the parties arises out of the contract, the injured party may bring a claim for negligence if the other party is subject to a standard of care independent of the terms of the contract. If the plaintiff's claim is based solely on a breach of a provision in the contract, which itself spells out the party's obligation, then the remedy normally will be only in contract, with contract measures of damages and contract statutes of limitation. That is so whether the breach of contract was negligent, intentional, or otherwise. In some situations, a party may be able to rely on either a contract theory or a tort theory or both." 313 Or. at 106, 831 P.2d 7. It then decided that, like physicians, lawyers, architects and others, liability insurers are subject to a standard of care that exists independent of the contract and without reference to the

specific terms of the contract. 313 Or. at 110, 831 P.2d 7. It explained: "When a liability insurer undertakes to 'defend,' it agrees to provide legal representation and to stand in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer. That kind of relationship carries with it a standard of care that exists independent of the contract and without reference to the specific terms of the contract. *See Strickland v. Arnold Thomas Seed*, 277 Or 165, 170, 560 P2d 597 (1977) (marketing agreement gave defendant complete control over pool members' seed; defendant was thus obliged to exercise the fiduciary duties of an agent); *Harper v. Interstate Brewery Co.*, [168 Or. 26, 120 P.2d 757 (1942)] (mortgagee exercising power of sale creates duty independent of contract). Therefore, plaintiff's excess claim can be brought as a claim for negligence." 313 Or. at 110-111, 831 P.2d 7. (Emphasis supplied; footnote omitted.)

The question in this case is whether the relationship between defendants and plaintiff was the kind of relationship that carries with it duties that exist independent of the contract and without reference to the specific terms of the contract. If there is such a special relationship, then plaintiff's claim for breach of the duties could be brought as a tort claim.

We find no cases, and the parties cite none, that characterize the relationship between a manufacturer and a dealer as a special or fiduciary-type relationship from which duties independent of the contract arise. Generally, a manufacturer-dealer relationship would not be the kind of relationship discussed by the Supreme Court in *Georgetown Realty*. Unlike physician-patient, lawyer-client,

architect-client, insurer-insured and agent-principal relationships, a dealer does not generally place complete control of critical aspects of the dealer's person, property or economic interests in the hands of the manufacturer, and the manufacturer generally does not stand in the shoes of the dealer or otherwise look after the dealer's interests as a fiduciary would.

This particular manufacturer-dealer relationship is not entirely typical of such relationships, however. If the parties construct an essentially fiduciary-type dependency relationship, duties will arise from that relationship. *See Strickland v. Arnold Thomas Seed*, 277 Or. 165, 170, 560 P.2d 597 (1977). We cannot say that there was no such relationship between the parties in this case. There was evidence that defendants encouraged plaintiff to enter a relationship of dependence and reliance beyond that contemplated in a typical dealership. There was ongoing, intensive supervision in which the field manager rode along with plaintiff and actually conducted sales on behalf of plaintiff. Plaintiff's supervisor did all of his paperwork for the first month, and continued to do some of that paperwork throughout plaintiff's tenure as a dealer. Snap-On provided plaintiff with extensive funding and financing and encouraged plaintiff to use Snap-On's credit extending program, even though it was often plaintiff's credit that was being extended.[6] There was also

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[6] The evidence showed that Snap-On encourages its dealers to extend credit to customers in some cases, allowing the customers to buy tools that they cannot afford at the time of purchase. In theory, the credit is extended by Snap-On, but it is the dealer who is liable to Snap-On for the credited amount.

evidence that defendants promised to "take care of" their dealers and exercised complete control over how the business was run and over the size and location of the dealer's territory. When plaintiff first became a dealer for Snap-On, his local supervisors told him which options to get in his Snap-On van, which tools to stock, which advertising items to order and how many of each, and what office equipment and supplies to purchase. There was promotional programs in which Snap-On would deliver to each dealer, whether the dealer wanted it or not, a set amount of the promotional tool of the month and automatically bill the dealer for the cost of those tools. Technically, the dealer could return the shipment, but he would have already been billed for it, and he would have to pay the freight to send the tools back to the Snap-On distribution center. The Dealership Agreement that plaintiff signed gave Snap-On complete control over plaintiff's territory. Snap-On reserved the power to adjust plaintiff's territory at any time. We have cited only a few specific examples in the evidence. Suffice to say that there is evidence from which the jury could find that a special relationship existed between the parties. The trial court did not err in submitting the claim for breach of the obligations of good faith and fair dealing to the jury.

In defendants' seventh assignment, they argue that the trail court erred in denying their motion for a directed verdict, made at the close of the plaintiff's case, on plaintiff's

claim of fraudulent concealment of material facts.[7] In their second amended complaint, plaintiff alleged:

"Snap-On markets tools and equipment to professional mechanics through a system of more than 3000 dealers nationwide. The size of dealership territories has been reduced over the past 20 years. Without 250 to 300 'professional' mechanics in a given territory, a dealer will not be able to achieve a successful independent business. Plaintiffs at all times here mentioned did not know, nor could they have known, how many mechanics were necessary for a successful business. "[Plaintiff] could not have discovered that a minimum of 250 to 300 'professional' mechanics were necessary for a successful business, because they did not have sufficient information and comparative data of other dealer territories, and their success and failure rates. Such information was only in the hands of the defendants." (Emphasis supplied.) In their motion for a directed verdict, defendants argued: "I think we should be clear on what's being alleged as an omission and what is not, and the alleged fact that should

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[7] Plaintiff argues that defendants did not preserve the error for appeal. He argues that the fraudulent concealment allegation was part of his single cause of action for fraud and that defendants' motion for directed verdict was not the proper vehicle for asking the court to decide, as a matter of law, that defendants were entitled to prevail on less than all the elements of the claim. *Whinston v. Kaiser Foundation Hospital*, 309 Or. 350, 360, 788 P.2d 428 (1990). However, at the time that defendants made their motion for a directed verdict on the fraudulent concealment claim, it was a separate claim and a separate cause of action. Plaintiff's claims for fraudulent concealment and fraudulent misrepresentation were consolidated later in the proceedings. The error was properly preserved.

have been disclosed was that you need 250 to 300 customers to be successful dealership, and there's no evidence of that in the record, so there's no basis for a jury finding in favor of the plaintiffs on [that] claim. "[T]here's no evidence that Snap-On had knowledge of the fact that a dealership must contain 250 to 300 customers to succeed." The trial court denied defendants' motion for a directed verdict, stating "that there [wa]s evidence in the record from which a jury could find both of the fraud cases, concealment and misrepresentation."

On review of the trial court's denial of defendants' motion for a directed verdict, plaintiff, as the non-moving party, is entitled to the benefit of all favorable evidence and reasonable inferences. We will sustain the denial if there is any evidence in the record from which the jury might conclude that the allegation of fraudulent concealment is true. *Brown v. J.C. Penney Co.*, 297 Or. 695, 705 n 3, 688 P.2d 811 (1984); *Paulson v. Western Life Insurance Co.*, 292 Or. 38, 40 n. 1, 636 P.2d 935 (1981). In order to withstand a motion for a directed verdict, therefore, the record must contain evidence from which the jury could conclude that a Snap-On dealership had to have 250 to 300 customers in it in order to be successful and that Snap-On knew that information and concealed it from plaintiff.

Jorgeson, a former Snap-On field manager and branch manager, testified that Snap-On had implemented a mandatory growth policy requiring field groups to generate a new territory every year out of existing territories. The result has been continually shrinking territories with fewer than 200 customers. According to Jorgeson, during economic slumps, "dealers cannot survive."

Mikesh, a former Snap-On dealer, testified that his territory "shrank" due to lay-offs and business moving out of the area. He testified that, because of the exodus, he was left with fewer than 225 customers and had only four days worth of work every week. Mikesh testified that, before his territory shrunk, he made "something less than $30,000 [a year] before taxes." After customers left his territory, he made less than that and it was his opinion that he could not be successful with the smaller territory.

Plaintiff also presented as an exhibit a document entitled "Success Express: Catch It!" The document is a guide for Snap-On branch and sales managers and contains a check-list called "Dealers Basics for Success." That check-list asks the branch and sales managers to check their dealers to be sure that they have "200 or more R.A. customers" and "at least 50 E.C. Customers."[8] Plaintiff also offered as an exhibit a document entitled "Field Manager New Dealer Checklist." That document contains the same "Basics for Success" check-list. Neither the "Success Express" nor the "Field Manager New Dealer Checklist" is distributed or made available to dealers. Both indicate that a dealership must have at least 250 active customers to be successful.

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[8] "R.A." stands for revolving account and "E.C." stands for extended credit. The former accounts are for customers who buy items on a regular basis. The customers (presumably) pay off their accounts on an ongoing basis with charges and credits revolving through. The extended credit accounts seem to be reserved for "big ticket" items, the cost of which the customer pays over time.

Finally, plaintiff testified that, although he was told that his territory would have 200 to 300 customers in it, he was not told that a territory *required* that many customers in order to be successful.[9] A jury could find from this evidence and the reasonable inferences that can be drawn that the allegation of fraudulent concealment is true. The trial court did not err in presenting the question to the jury.

In defendants' eighth assignment of error, they argue that the trial court erred in denying their motion for a judgment notwithstanding the verdict and in overruling their objection to the form of the verdict, which granted awards to plaintiff for both fraud and breach of contract.[10] Defendants argue that the awards for fraud and breach of contract are inconsistent and duplicative, because the first is based on rescission and restitution, while the second affirms the contract. According to defendants, plaintiff is not entitled to both awards and should have been required to make an election of remedies.[11] Plaintiff first responds by arguing that defendants

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[9] In a separate claim, plaintiff alleged that defendants' representation that his territory would have 200 to 300 customers was false and constituted fraudulent misrepresentation.

[10] Defendants do not assert that the award for breach of the implied covenant of good faith and fair dealing is duplicative. The jury made an independent award on each of the three claims.

[11] Defendants actually argue that plaintiff made an election to affirm the contract after the verdict was returned and, consequently, the award for fraud and the attached punitive damages should be vacated. However, as our discussion indicates, infra, we do not find that the award for fraud was based on the theory of rescission and plaintiff's statements affirming the contract after the verdict do not require that the award for fraud be vacated.

did not preserve the issue for appeal, because they did not raise their objection at the proper time. Plaintiff also argues that, even if they did, the awards are not inconsistent or duplicative, because they are based on different conduct by defendants, neither is based on a theory of rescission or restitution and both affirm the contract.

As an initial matter, we find that defendant preserved the issue for appeal. Defendants objected to the form of the verdict as returned by the jury, and were not required to demand an election or object before then. ORCP 16C allows a party to plead inconsistent claims, and an election of remedies may be made after the case has gone to judgment on the merits. *Colonial Leasing Co. v. Tracy*, 276 Or. 1193, 1196, 557 P.2d 639 (1976); *See also Arter v. Spathas*, 98 Or.App. 362, 779 P.2d 1066 (1989). Defendants objected at a proper time, when the jury returned its verdict, and renewed that objection in their motions for judgment notwithstanding the verdict and, in the alternative, for a new trial.

On the merits, a party may not affirm and rescind a contract at the same time. However, fraud is not necessarily an action to rescind and, consequently, it is not necessarily inconsistent with a claim for breach of contract. *Godat v. Waldrop*, 78 Or.App. 374, 379, 717 P.2d 180, *rev. den.* 302 Or. 86, 726 P.2d 1185 (1986). We have said that "a party induced by misrepresentation to enter into a contract has an election of remedies; he may rescind the contract and be entitled to return of any consideration he has parted with or he may affirm the contract and sue for damages." *Snyder v. Rhoads*, 47 Or.App. 545, 554, 615 P.2d 1058 (1980). (Citations omitted.) Thus, a fraud claim is inconsistent with a breach of contract claim only if the

plaintiff seeks to rescind the contract as a remedy for the alleged fraud. If the plaintiff seeks to affirm the contract and recover damages, the fraud claim is consistent with a breach of contract claim.

Defendants argue that plaintiff sought restitution and thus sought to rescind the dealership contract. Defendants base that argument on plaintiff's evidence of damages due to defendants' fraud. That evidence showed what plaintiff had invested in the Snap-On dealership, income foregone and other sacrifices made in reliance on defendants' representations.[12] Although that measure of damages sounds in restitution, it does not control the nature of the action or require the conclusion that the award received was restitution.

Damages for breach of contract are awarded with the intent of putting the injured party in as good a position as performance would have. *See, e.g., Stubblefield v. Montgomery Ward & Co.*, 163 Or. 432, 448, 96 P.2d 774, 98 P.2d 14 (1940); 5 Corbin Contracts § 992 (1964). The amount of damages required to achieve that purpose can be shown by proof of the value of the anticipated benefit or gain, e.g., future profits, or by proof of the value of expenditures and preparations made, which the injured party reasonably expected to recoup through the anticipated benefit or gain. *See, e.g., Verret v. Leagjeld*, 263 Or. 112, 501

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[12] Defendants point to no other evidence in the record indicating that plaintiff sought to rescind the dealership contract through their fraud claim and we find no other such evidence. In the complaint, plaintiff prayed for damages due to defendants' fraud, and do not ask for restitution or rescission of the dealership contract.

P.2d 780 (1972); *Western Energy, Inc. v. Georgia-Pacific*, 55 Or.App. 138, 637 P.2d 223 (1981); 5 Corbin Contracts § 996 (1964).

Plaintiff's evidence of damages due to defendants' fraud showed the amount he invested in the venture in reliance on defendants' fraudulent representations, and the amount he could have earned if he had continued in his previous employment. Those monies represent expenditures plaintiff made and income foregone in preparation for and performance of the dealership contract, which plaintiff reasonably expected to recoup if both parties performed their duties under that contract, and are recoverable as a measure of damages. Plaintiff's recovery for defendants' fraud was in the nature of damages and was not inconsistent with his recovery for defendants' breach of contract.

Plaintiff's recoveries for fraud and breach of contract, however, are duplicative in that they compensate plaintiffs twice for the same losses. As was just discussed, plaintiff reasonably expected to recover the expenditures he made and income foregone in preparation and performance of his duties under the dealership contract. The recovery for those sacrifices was to be in the form of profits from the dealership, profits he recovered in the award for defendants' breath of contract. Because the awards for fraud and breach of contract are duplicative, the case must be remanded for plaintiff to make an election of remedies.

In defendants' ninth assignment of error, they argue that plaintiff's claim for lost future profits for breach of contract was not supported by the evidence and should

not have been submitted to the jury. We review to determine whether there was sufficient evidence to establish that a loss of profits "probably occurred." *MacLean & Associates v. American Guaranty Life*, 85 Or.App. 284, 296, 736 P.2d 586, *rev. den.* 304 Or. 55, 742 P.2d 1186 (1987). Loss of profits need not be proved with absolute certainty: "[T]o recover for lost profits or sales, a plaintiff must prove these damages with 'reasonable certainty.' * * * Loss of future profits may be established by proof of past profits of an established business * * * ." *Willamette Quarries v. Wodtli*, 308 Or. 406, 412, 781 P.2d 1196 (1989). (citations omitted.) As evidence of the existence and amount of his lost profits, plaintiff relied on several documents provided by defendants, including a document that presented income comparisons of Snap-On dealers, tax returns and financial analyses for 18 Portland area Snap-On dealers, and a statement of profit potential for new Snap-On dealers, which stated that "your earnings as a Snap-On dealer are above the national income average, enabling you to acquire the good things in life. Successful dealers are among the top 10% of national income brackets, along with doctors, lawyers, and other professionals. * * * [M]ost dealers recover their initial investment in inventory in less than a year." We find sufficient evidence in the record to support the jury's conclusion that plaintiff proved with reasonable certainty the existence and amount of lost future profits that he would have earned as a Snap-On dealer if defendants performed all their duties under the dealership contract. The trial court did not err in submitting the claim to the jury.

In defendants' tenth assignment of error, they argue that the trial court erred in overruling their objection to the verdict when a jury poll established that the same nine jurors did not concur in both awards of punitive damages, for fraud and tortious breach of the duty of good faith. Plaintiff concedes that a unanimous jury found defendants liable on both claims and that different groups of nine jurors voted to award punitive damages on each of the claims. However, plaintiff argues, the law only requires that the same nine jurors decide all elements on a single claim. Plaintiff is correct. In a civil case in which the answers to the questions on a verdict form are interdependent, the same nine jurors must agree on all the answers. The rule does not apply, however, where the answers to the questions are independent. *Veberes v. Knappton Corporation*, 92 Or.App. 378, 381, 759 P.2d 279, *rev. den.* 307 Or. 78, 763 P.2d 732 (1988). Here, the awards of punitive damages were dependent on the jury's conclusion that defendants were liable to plaintiff. All jurors concluded that defendants were liable on both claims for which punitive damages were awarded. But the award for punitive damages on the fraud claim was *not* dependent on the award of punitive damages on the claim for tortious breach of the duty of good faith, and the same nine jurors did not have to agree on both awards.

Finally, in defendants' last assignment of error, they claim that the award of punitive damages against them violates the federal Due Process and Excessive Fines Clauses, and Article I, sections 10, 11 and 16, of the Oregon Constitution. We rejected a materially identical argument in *Oberg v. Honda Motor Co.*, 108 Or.App. 43,

814 P.2d 517, *aff'd* 316 Or. 263, 851 P.2d 1084 (1993).[13] We reject this argument as well. The award of punitive damages was proper.

Plaintiff asks us to consider his assignment of error on cross-appeal only if we remand. Because we affirm the trial court and remand only for an election of remedies, we do not address his assignment.

In light of our disposition, we vacate the judgment. Plaintiff is entitled to an amended judgment awarding compensatory and punitive damages on the claim for breach of the implied covenant of good faith and fair dealing and on the claim they elect between the verdicts on the claims for fraud and breach of contract.

On appeal, judgment vacated and remanded for entry of amended judgment in accordance with this opinion; affirmed on cross-appeal.

EDMONDS, Judge, concurring.

I agree with the lead opinion that defendants' wrongful conduct toward plaintiff that occurred before the termination agreement was signed, when combined with defendants' conduct on that day, resulted in plaintiff signing the release under economic duress. I do not agree with the assertion that, if the examination of the evidence is limited to the day that the release was signed, plaintiff made out a case for economic duress. *See* 121 Or.App. at 31 n. 4, 853 P.2d at 1355 n. 4.

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[13] It is unclear whether the Supreme Court's opinion goes beyond punitive damages in product's liability cases.

WARREN, Presiding Judge, dissenting.

I cannot join in the majority's opinion. In my view, plaintiff has not shown that he is entitled to rescind the release agreement under any of his theories. The release bars all of his claims. Therefore, I would reverse.

The majority concludes that plaintiff may rescind because of economic duress. The gravamen of that claim is the deprivation of a party's free will by the wrongful act of another party. *See Capps v. Georgia-Pacific*, 253 Or. 248, 453 P.2d 935 (1969). The majority's error is in its global view of what constitutes a "wrongful act." 121 Or.App. at 31, 853 P.2d at 1355. It considers as pertinent all of defendant's conduct throughout the dealership relationship. However, what is relevant is defendants' conduct *at the time the termination agreement*, which contains the release, *was signed*. It is plaintiff's agreement to that release that is at issue, and it is defendants' conduct as related to that agreement that is pertinent. Thus, the focus must be on whether the conduct that resulted in the signing of the termination agreement was wrongful.

Plaintiff asserts that it was wrongful to require him to sign the termination agreement before he could receive a refund for his tools. However, under the dealership agreement, Snap-On was not required to buy back plaintiff's tools. The agreement provided: "In the event of termination of this Agreement * * * , the Dealer may * * * *with the consent of the Company,* * * * sell to the Company at the price paid by the Dealer any of the Products which have been purchased by the Dealer and

which remain in its possession in new, saleable condition." (Emphasis supplied.) Doing what a person has a legal right to do is not wrongful conduct. *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 68 Or.App. 131, 143, 683 P.2d 95 (1984). Because Snap-On had no legally enforceable duty to repurchase the inventory from a terminating dealer, Snap-On and its agents were justified in insisting on a release of all claims plaintiff might have against them in return for the agreement to repurchase. There was nothing legally wrongful in that conduct.

Further, the majority is wrong in concluding that plaintiff had no reasonable alternatives to signing the termination agreement. The test, as the majority says, is whether, given a choice between doing what defendants required or not doing it, there was a reasonable third alternative; that is, would a reasonably prudent person have taken the alternative course. The termination agreement provided that Snap-On would buy back plaintiff's inventory at current dealer cost. Under the dealer agreement, plaintiff had the option on termination of keeping the inventory and selling it outside the dealership, which would have allowed him to recoup his inventory investment.[1] Plaintiff also could have refused to sign the agreement, reserving his rights, or could have taken the termination agreement home with him and sought legal

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[1] Plaintiff argues that, pursuant to a consignment agreement, he was required on termination to return all goods consigned to him, and therefore he did not have the option to keep the tools. That argument is not persuasive, because there is no evidence that plaintiff had any consigned tools in his possession on the date of termination.

advice before he signed it. "The whole point of an economic duress claim is that the plaintiff had no reasonable choice but to enter into the contract." *Gruver v. Midas Intern. Corp.*, 925 F.2d 280, 283 n. 1 (9th Cir. 1991). Plaintiff had not one, but at least three, reasonable alternatives to signing the termination agreement. Accordingly, I would conclude that his agreement to the release was not a result of economic duress.[2]

Plaintiff also asserts that the release should be rescinded because of mistake. "In order to avoid a contract on account of a unilateral mistake it is necessary that there be a mistake, that the mistake is basic and known to the other party, or that circumstances are such that the other party, as a reasonable person, should have known of the mistake." *Gardner v. Meiling*, 280 Or. 665, 674, 572 P.2d 1012 (1977). Plaintiff asserts that he signed the termination agreement not knowing that it contained the release and, therefore, was mistaken as to the existence of the release.

The evidence is that, when plaintiff signed the termination agreement, it was one of numerous documents that he was told to sign. He did not read all of the documents, although he was not prevented from doing that. Neither did he ask to take any of the documents home with him to study before he signed them. Although he did not read the termination agreement, Park read it to

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[2] In addition, plaintiff testified that, when he signed the termination agreement, he just wanted to get out of the office and get his money back. That is not evidence that his agreement to the release was coerced; indeed, the evidence is that he *wanted* to sign it in order to recoup some of his investment.

him. Park did not explain or specifically point out the release provision. Having had the opportunity to read the release and having had it read to him, plaintiff cannot be said to have been mistaken as to the existence of the release provision. It is not enough that plaintiff may not have fully understood the legal effect of the release. *See Shell Oil Co. v. Boyer,* 234 Or. 270, 277, 381 P.2d 494 (1963).

Plaintiff's attempt to rescind based on undue influence is likewise flawed. Under that theory, plaintiff must show that he was " 'under the domination of [defendants] or by virtue of the relation between them [was] justified in assuming that [defendants would] not act in a manner inconsistent' " with his welfare. *Egr v. Egr et al,* 170 Or. 1, 7, 131 P.2d 198 (1942) (quoting Restatement of the Law, Contracts § 497). The evidence here was that, far from being under defendants' domination, plaintiff was acting contrary to their advice in terminating the dealership. The relationship had by this time become adversary, and there was no evidence that plaintiff believed that defendants were recommending the termination agreement for his, but not their, best interest. There was no undue influence.

Finally, plaintiff asserts that he may rescind because the agreement was one of adhesion, or because it lacked consideration. The release is not avoidable as an adhesion contract. There was consideration given for the release, in the form of the mutual release of claims and defendants' agreement to repurchase the tool inventory. The dealer agreement gave defendant the option to repurchase or not. In exchange for agreeing to repurchase plaintiff's inventory at current dealer cost and to release any claims

it may have had against plaintiff, it was entitled to extract the release agreement.

I would hold that the release is enforceable and that it bars all of plaintiff's claims. Accordingly, I dissent.

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN EULRICH Respondent-Cross-Appellant Respondent VIRGINIA EULRICH Respondent-Cross-Appellant Respondent DEPARTMENT OF JUSTICE Respondent/Respondent v. SNAP-ON TOOLS CORPORATION Appellant-Cross-Respondent Petitioner TIM KASH Appellant-Cross-Respondent Petitioner RAY PARK Appellant-Cross-Respondent Petitioner PAUL HUTCHINS Defendant	)	ORDER DENYING REVIEW CA A64027 SC S40453

The Court has considered the petition for review and orders that it be denied.

DATE: September 21, 1993.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

PETERSON, J., WOULD ALLOW

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

DAN EULRICH and VIRGINIA EULRICH, husband and wife, Plaintiffs-Respondents/ Cross-Appellants, and DEPARTMENT OF JUSTICE, Intervenor-Respondent, v. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-On Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-On Tools Corporation, Defendants-Appellants/ Cross-Respondents, and PAUL HUTCHINS, individually and as a Supervisor of Snap-On Tools Corporation, Defendant.	Linn County Circuit Court No. 88-0708 CA A64027 SC S40453 ORDER DENYING RECONSIDERATION

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant

review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ W. L. RICHARDSON
WILLIAM L. RICHARDSON
CHIEF JUDGE
August 11, 1993
DATE

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LINN

DAN EULRICH and VIRGINIA EULRICH, Husband and wife, Plaintiffs, vs. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-On Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-On Tools Corporation; and PAUL HUTCHINSON, Individually and as a Supervisor of Snap-On Tools Corporation, Defendants.	No. 88-0708 ORDER UPON DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITH-STANDING THE VERDICT OR FOR NEW TRIAL

THIS MATTER having come before the Court upon Defendants' motions for judgment notwithstanding the verdict or, alternatively, for new trial, and defendants having submitted extensive points and authorities and argument, and Plaintiffs having submitted substantial points and authorities and argument in contravention of Defendants' motions, and both parties having appeared by and through their attorneys on the 7th day of February, 1990, and having argued this matter in open court, and the Court being otherwise fully advised on the premises; Now, Therefore,

IT IS HEREBY ORDERED that Defendants' motions for judgment notwithstanding the verdict or, alternatively, for new trial are denied in their entirety.

DATED this ____ day of February, 1990.

/s/ _____
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LINN

DAN EULRICH and VIRGINIA EULRICH, Husband and wife, Plaintiffs, vs. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-On Tools Corp.; RAY PARK, individually and as a Supervisor of Snap-On Tools Corporation; and PAUL HUTCHINS, Individually and as a Supervisor of Snap-On Tools Corporation; Defendants.	No. 88-0708 MONEY JUDGMENT

THIS MATTER having come on for trial before the Honorable Jackson L. Frost on October 23, 1989. Plaintiffs appeared by and through their attorney, William D. Brandt. Defendants appeared by and through their attorneys, Wayne Hilliard, Milo Petranovich, and Gordon Hathaway.

After a jury was impaneled and opening statements made, testimony and other evidence were introduced in support of the respective cases of the parties. The court granted a directed verdict on plaintiffs' Third Cause of Action for interference with business relations and the

court heard and determined plaintiffs' Seventh Cause of Action and made findings in favor of plaintiffs. The court combined plaintiffs' First and Second Cause of Action and plaintiffs' Fourth and Sixth Causes of Action, which in combined form where [sic] submitted to the jury, along with plaintiffs' Fifth Cause of Action. After the parties rested and closing arguments were made, the jury, having been instructed upon all matters of law and having retired to deliberate upon its verdict, did thereafter on November 20, 1989, return into court a verdict which was in the attached form marked Exhibit A and by this reference incorporated herein.

It appears that all claims between the parties have been resolved, and the matter now coming on for judgment upon the foregoing verdict.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs have judgment against defendants Snap-On Tools Corporation, a Delaware corporation, Tim Kash and Ray Park in the amount of $4,850,000, together with interest at the legal rate from November 21, 1989, and for their costs and disbursements incurred herein.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED, that plaintiffs have judgment against Snap-On Tools Corporation, a Delaware corporation, in the additional amount of $4,062,000, together with interest at the legal rate from November 21, 1989, until paid.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that plaintiffs have judgment against defendant Snap-On Tools Corporation on their Seventh Cause of Action for rescission, and the Termination Agreement

between Snap-On Tools Corporation and Dan Eulrich dated June 1, 1987 is rescinded.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that plaintiffs' claims against defendant Paul Hutchins are dismissed, and Paul Hutchins have judgment against plaintiffs for his costs and disbursements incurred herein.

MONEY JUDGMENT dated this 15 day of December, 1989.

/s/ Jackson L. Frost
HON. JACKSON L. FROST
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LINN

DAN EULRICH and VIRGINIA EULRICH, husband and wife, Plaintiffs, vs. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-On Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-On Tools Corporation; and PAUL HUTCHINS, Individually and as a Supervisor of Snap-On Tools Corporation, Defendants.	No. 88-0708 AMENDED MONEY JUDGMENT

THIS MATTER having come on for trial before the Honorable Jackson L. Frost on October 23, 1989. Plaintiffs appeared by and through their attorney, William D. Brandt. Defendants appeared by and through their attorneys, Wayne Hilliard, Milo Petranovich, and Gordon Hathaway.

After a jury was impaneled and opening statements made, testimony and other evidence were introduced in support of the respective cases of the parties. The court granted a directed verdict on plaintiffs' Third Cause of Action for interference with business relations and the

court heard and determined plaintiffs' Seventh Cause of Action and made findings in favor of plaintiffs. The court combined plaintiffs' First and Second Causes of Action and plaintiffs' Fourth and Sixth Causes of Action, which in combined form were submitted to the jury, along with plaintiffs' Fifth Cause of Action. After the parties rested and closing arguments were made, the jury, having been instructed upon all matters of law and having retired to deliberate upon its verdict, did thereafter on November 20, 1989, return into court a verdict which was in the attached form marked Exhibit "A" and by this reference incorporated herein.

It appears that all claims between the parties have been resolved, and the matter now coming on for judgment upon the foregoing verdict.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs have judgment against defendants Snap-On Tools Corporation, a Delaware corporation, Tim Kash and Ray Park in the amount of $4,850,000, together with interest at the legal rate from November 21, 1989, and for their costs and disbursements incurred herein.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED, that plaintiffs have judgment against Snap-On Tools Corporation, a Delaware corporation, in the additional amount of $4,062,000, together with interest at the legal rate from November 21, 1989, until paid.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that plaintiffs have judgment against defendant Snap-On Tools Corporation on their Seventh Cause of Action for rescission, and the Termination

Agreement between Snap-On Tools Corporation and Dan Eulrich dated June 1, 1987 is rescinded.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that plaintiffs' claims against defendant Paul Hutchins are dismissed, and Paul Hutchins have judgment against plaintiffs for his costs and disbursements incurred herein.

MONEY JUDGMENT

Pursuant to ORCP 70, the plaintiffs' money judgment is as follows:

A.	Judgment Creditors:	Dan Eulrich and Virginia Eulrich, Husband and wife.
B.	Judgment Creditors' Attorney:	William D. Brandt
C.	Judgment Debtors:	Snap-On Tools Corporation, a Delaware corporation, Tim Kash, and Ray Park.
D.	Judgment Amount:	$8,912,000 as to Defendant Snap-On Tools Corporation, of which $4,850,000 of said amount is against Defendants Tim Kash and Ray Park.
E.	Interest:	Interest upon the above money judgment amounts shall accrue at the legal rate of 9% per annum from November 21, 1989, until fully paid.

DATED NUNC PRO TUNC to December 15, 1990, this 15 Day of February, 1990.

/s/ Jackson L. Frost
HON. JACKSON L. FROST
CIRCUIT JUDGE

Dan EULRICH and Virginia Eulrich, Husband and Wife, Respondents-Cross-Appellants,
and
Department of Justice, Intervenor-Respondent,
v.
SNAP-ON TOOLS CORPORATION, a Delaware corporation; Tim Kash, Individually and as a Supervisor of Snap-On Tools Corporation; Ray Park, individually and as a Supervisor of Snap-On Tools Corporation, Appellants-Cross-Respondents, Paul Hutchins, individually and as a Supervisor of Snap-On Tools Corporation, Defendant-Cross-Respondent.
88-0708; CA A65027.
Court of Appeals of Oregon.
On Appellants-Cross Respondents' motion for summary determination of appealability March 14, 1990.
Decided October 10, 1990.

103 Or. App. 610, 798 P.2d 715

Before ROSSMAN P.J., and NEWMAN and EDMONDS, JJ.

ROSSMAN, Presiding Judge.

Appellants appeal from a judgment for approximately $14,000,000 in damages in favor of a former dealer of Snap-On Tools Corporation. The major portion of the judgment derives from the punitive damages award. After the verdict, the state intervened

pursuant to ORS 18.540 in order to secure its portion of the punitive damage award, but the judgment being appealed does not purport to adjudicate any interest of the state. Appellants question whether the state's "claim" must be adjudicated in order to render the judgment final. Accordingly, they have moved for a determination of appealability under ORS 19.034(3). We hold that judgment is final.

Pursuant to ORS 18.540, the state, specifically the Criminal Injuries Compensation Account, is entitled to a portion of every punitive damages award: "The punitive damage portion of an award shall be distributed as follows: "(1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party. "(2) One-half of the remainder shall be paid to the prevailing party. "(3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity."

In this case, just before the judgment was entered, the Attorney General moved to intervene on behalf of the Criminal Injuries Compensation Account and made a "claim" for its statutory portion of the punitive damages. The trial court allowed the motion to intervene but took no action on the "claim."

The state's intervention should have been based on a claim set forth in a pleading: "A person desiring to intervene shall serve a motion to intervene upon the

parties as provided in Rule 9. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought * * * ." ORCP 33D. The state was unable to state a claim in the pleading accompanying its motion to intervene, because it had no interest in, or knowledge of, the case beyond its entirely contingent right under ORS 18.540 to a portion of whatever punitive damages might eventually be distributed. Because the state's right under ORS 18.540 is triggered only when a fund capable of distribution exists, the state may not interfere in the actual prosecution of the action. The state, therefore, has presented no claim that requires trial court disposition before this appeal may proceed.[1]

Motion to determine appealability allowed; judgment held final.[2]

---

[1] Although it is questionable whether the state should have been allowed to intervene, that question is not before us.

[2] See *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019 (1990).

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

DAN EULRICH and VIRGINIA EULRICH husband and wife, Plaintiffs, v. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-on Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-on Tools Corporation; and PAUL HUTCHINSON, individually and as a Supervisor of Snap-on Tools Corporation, Defendants.	No. 88-0708 DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR NEW TRIAL ORAL ARGUMENT REQUESTED

Pursuant to ORCP 63 and 64, defendants Snap-on Tools Corporation (Snap-on), Park and Kash move the court for an order granting them judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendants are entitled to judgment notwithstanding the verdict or to a new trial on each of plaintiffs' three claims (fraud, tortious breach of the covenant of good faith and fair dealing, and breach of contract) on the following grounds.

* * *

IV. Other Grounds For Relief:

* * *

C. Defendants are entitled to judgment notwithstanding the verdict or a new trial because the jury's assessment of punitive damages denied defendants due process of law under the U.S. Constitution. ORCP 63, ORCP 64B(5), (6).

In support of this motion, defendants rely on ORCP 63 and 64, and the memorandum of points and authorities and Affidavit of Milo Petranovich in support of this motion filed concurrently.

SPEARS, LUBERSKY, BLEDSOE,
ANDERSON, YOUNG &
HILLIARD

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

DAN EULRICH and VIRGINIA EULRICH, husband and wife, Plaintiffs, vs. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-on Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-on Tools Corporation; and PAUL HUTCHINSON, individually and as a Supervisor of Snap-on Tools Corporation, Defendants.	) No. 88-0708

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL

* * *

VII

THE COURT SHOULD ORDER NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONAL

A. Oregon's Method Of Assessing Punitive Damages, On Its Face, Denies Due Process.

Oregon's method of assessing punitive damages, on its face, violates the due process guarantee of the Fourteenth Amendment of the United States Constitution.

* * *

Immensely exacerbating that constitutional defect is Oregon's unique constitutional provision, Or. Const., Art. 7, § 3, which precludes any court, trial or appellate, from reviewing the amount of punitive damages awarded. *Van Lom v. Schneiderman*, 197 Or. 89, 210 P.2d 461, 11 A.L.R.2d 1195, 1206-1209 (1949).

* * *

Thus, under Oregon law, the amount of punitive damages is "committed to the discretion of the jury," *Van Lom v. Schneiderman, supra*, 187 Or. at 108, with virtually no guidance and no limit on the punishment the jury can impose on the object of its wrath. As Justice O'Connor wrote in *Bankers Life & Cas. Co. v. Crenshaw, supra*, 108 S.Ct. at 1656, "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

The due process defect inherent in Oregon's standardless grant to the jury of discretion to fix the amount of punitive damages is made intolerable by Oregon's unique rule that if there is evidence to support the jury's finding of wanton misconduct, no court, trial or appellate, may re-examine the amount of punitive damages for excessiveness or abuse of discretion. *State ex. rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1274 (1980); *Van Lom v. Schneiderman, supra*, 187 Or. at 105-106, 210 P.2d at 468; Or. Const., Art. 7, § 3.

* * *

B. Oregon's Exemplary Damages Procedures Deny Due Process As Applied In This Case.

Oregon's procedures for assessing punitive damages are not only unconstitutional on their face. As applied in this case, they have resulted in awards of exemplary damages which cannot withstand constitutional scrutiny.

* * *

The jury's awards totalling $8,450,000 of exemplary damages in this case plainly exceed that constitutional maximum.

* * *

No matter in what light they are viewed – in relation to actual harm caused, reprehensibility of conduct, or defendants' resources – the exemplary damage awards in this case are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." They violate due process and must be vacated.

VIII

CONCLUSION

For all of the foregoing reasons, the Court should enter judgment notwithstanding the verdict or other [sic] a new trial of this action.

DATED this 5 day of January, 1990

SPEARS, LUBERSKY, BLEDSOE, ANDERSON, YOUNG & HILLIARD

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

DAN EULRICH and VIRGINIA EULRICH, husband and wife, Plaintiffs-Respondents/ Cross-Appellants, and DEPARTMENT OF JUSTICE, Intervenor-Respondent, v. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-on Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-on Tools Corporation, Defendants-Appellants/ Cross-Respondents, and PAUL HUTCHINS, individually and as a Supervisor of Snap-on Tools Corporation, Defendant.	CA No. A64027 TC No. 88-0708

APPELLANTS' OPENING BRIEF AND
ABSTRACT OF RECORD

---

* * *

Assignment of Error No. 11

The court erred in entering judgment on the punitive damage awards. Those awards denied defendants due process of law under the United States Constitution, and were excessive fines under the United States and Oregon Constitutions.

* * *

A.

The punitive damage awards denied defendants due process of law under the United States Constitution, because they were imposed without adequate standards or any right of review.[31]

* * *

3. The constitutional prohibition against judicial review of a verdict for punitive damages violates due process.

The due process problem presented by punitive damage verdicts is more serious in Oregon than elsewhere, because of Oregon's "lonely eminence" in denying judicial review of a jury verdict for punitive damages, however excessive. *Van Lom v. Schneiderman, supra,* 187 Or at 105-06, 112-13; *State ex rel Young v. Crookham, supra,* 290 Or at 71.

---

[31] Some of these issues are pending before the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip,* 553 So2d 537, (Ala 1989), *cert granted* ___ US ___, 110 S Ct 1780 (1990).

* * *

Under present law, the defendant has no such protection. The Oregon law of punitive damages is a lethal combination of a jury's standardless discretion over the fact and amount of an award, and the rule that its decision is a finding of fact that cannot be reviewed for excessiveness.

* * *

5. The judgment denied defendants due process of law because it was excessive.

The Due Process Clause forbids a verdict for damages that is "grossly excessive," *Waters-Pierce Oil Co. v. Texas*, 212 US 86, 111 (1909), or one "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis I.M. & S.R. Co. v. Williams*, 251 US 63, 67 (1919). This is plainly such a verdict.

* * *

Respectfully submitted,

LANE POWELL SPEARS LUBERSKY

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN EULRICH and VIRGINIA EULRICH, husband and wife, Respondents on Review, and DEPARTMENT OF JUSTICE, Intervenor-Respondent on Review, v. SNAP-ON TOOLS CORPORATION, a Delaware corporation; TIM KASH, individually and as a Supervisor of Snap-on Tools Corporation; RAY PARK, individually and as a Supervisor of Snap-on Tools Corporation, Petitioners on Review, and PAUL HUTCHINS, individually and as a Supervisor of Snap-on Tools Corporation, Defendant.	SC No. _____ CA No. A64027 TC No. 88-0708

PETITION FOR REVIEW
OF SNAP-ON TOOLS CORPORATION,
TIM KASH AND RAY PARK

* * *

III. PUNITIVE DAMAGES HAVE BECOME UNCONSTITUTIONAL IN OREGON UNLESS *VAN LOM* AND *OBERG* ARE OVERRULED.

A. All Opinions In The *TXO* Case Agree That Meaningful Post-Trial Review Is A Condition To A Constitutional Award of Punitive Damages.

* * *

B. Punitive Damages Are Unconstitutional Unless *Van Lom* and *Oberg* are Overruled.

Article VII, Section 3 of the Oregon Constitution provides that "no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively state there is no evidence to support the verdict." *Van Lom v. Schneiderman*, 187 Or. 89, 210 P.2d 461 (1949) held this to mean that punitive damage awards cannot be reviewed post-verdict on the issue of excessiveness. *Oberg v. Honda Motor Co.*, 316 Or. 263, 851 P.2d 1084 (1993) concurred, at least where courts follow special statutory pre-verdict procedures applicable to products liability cases. *Van Lom* and *Oberg* thus prohibit the post-verdict review required by the federal constitution as a prerequisite to allowing punitive damages.

It thus follows that, absent an overruling of *Van Lom* and *Oberg*, punitive damages cannot be awarded in Oregon.

* * *

C. Here Defendants Had A Powerful Case That The Punitive Damages Award Was Excessive But Were Deprived Of The Right To Present It.

* * *

CONCLUSION

The petition for review should be allowed.

Respectfully submitted,

LANE POWELL SPEARS LUBERSKY

GRIPPO & ELDEN

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

DAN EULRICH AND VIRGINIA EULRICH, HUSBAND AND WIFE, PLAINTIFFS, VS. SNAP-ON TOOLS CORPORATION, A DELAWARE CORPORATION, TIM KASH, INDIVIDUALLY AND AS A SUPERVISOR OF SNAP-ON TOOLS CORPORATION; RAY PARK, INDIVIDUALLY AND AS A SUPERVISOR OF SNAP-ON TOOLS CORPORATION, AND PAUL HUTCHINS, INDIVIDUALLY AND AS A SUPERVISOR OF SNAP-ON TOOLS CORPORATION, DEFENDANTS.	NO. 88-0708

FRIDAY, NOVEMBER 17, 1989
LINN COUNTY COURTHOUSE
ALBANY, OREGON

TRANSCRIPT OF PROCEEDINGS

VOLUME XXXI

BEFORE: THE HONORABLE JACKSON L. FROST

* * *

IF YOU HAVE FOUND THAT THE PLAINTIFFS ARE ENTITLED TO COMPENSATORY DAMAGES UNDER ONE OR MORE OF THEIR CLAIMS, EXCLUDING

THEIR CLAIM FOR BREACH OF CONTRACT, YOU MUST THEN CONSIDER WHETHER TO AWARD PUNITIVE DAMAGES.

PUNITIVE DAMAGES MAY BE AWARDED TO PLAINTIFFS IN ADDITION TO COMPENSATORY DAMAGES IN ORDER TO PUNISH THE WRONGDOER AND TO DISCOURAGE DEFENDANTS AND OTHERS FROM ENGAGING – ENGAGING IN WANTON CONDUCT.

IN CONSIDERING PUNITIVE DAMAGES, YOU MUST FIRST DETERMINE WHETHER THE DEFENDANTS WERE GUILTY OF WANTON MISCONDUCT THAT CAUSED DAMAGES TO THE PLAINTIFFS.

WANTON MISCONDUCT IS CONDUCT AMOUNTING TO A PARTICULAR AGGRAVATED, DELIBERATE DISREGARD OF THE RIGHTS OF OTHERS.

IF YOU DECIDE THIS ISSUE AGAINST THE DEFENDANTS, YOU MAY AWARD PUNITIVE DAMAGES, ALTHOUGH YOU ARE NOT REQUIRED TO DO SO, BECAUSE PUNITIVE DAMAGES ARE DISCRETIONARY.

IN THE EXERCISE OF THAT DISCRETION, YOU MAY CONSIDER THE IMPORTANCE TO SOCIETY IN DETERING SIMILAR CONDUCT IN THE FUTURE.

IF YOU TO DECIDE – IF YOU DO DECIDE TO AWARD PUNITIVE DAMAGES, YOU MAY PROPERLY CONSIDER THE FOLLOWING ITEMS IN FIXING THE AMOUNT:

1, THE CHARACTER OF DEFENDANTS' CONDUCT;

2, THE DEFENDANTS' MOTIVE;

3. THE SUM OF MONEY THAT WOULD BE REQUIRED TO DISCOURAGE THE DEFENDANTS AND OTHERS FROM ENGAGING IN SUCH CONDUCT IN THE FUTURE;

AND THE INCOME AND ASSETS OF THE DEFENDANT.

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(2)

No. 93-697

DEC 20 1993
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

SNAP-ON TOOLS CORPORATION, TIM KASH, and RAY PARK,

Petitioners,

v.

DAN EULRICH, VIRGINIA EULRICH, and DEPARTMENT OF JUSTICE OF THE STATE OF OREGON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

RESPONDENTS' BRIEF IN OPPOSITION

CLAYTON C. PATRICK
Patrick & Meadowbrook
P.O. Box 884
Salem, Oregon 97308
(503) 581-5240
Attorney for Respondents

December 14, 1993

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the pre-trial, trial and post-trial procedures for review of punitive damages awards in Oregon violate the Due Process Clause.

TABLE OF CONTENTS

I. PETITIONERS' ARGUMENTS WERE NOT PROPERLY RAISED AT THE TRIAL COURT 3

II. EVEN IF THE ARGUMENT HAD BEEN PROPERLY RAISED, OREGON'S PUNITIVE DAMAGE LAWS ARE CONSTITUTIONAL 7

III. THE PUNITIVE DAMAGE AWARDS WERE NOT EXCESSIVE 9

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Statutes & Rules:

Or. Rev. Stat. 41.315(1) 4

ORCP 63A 7

Oregon Rule of Civil Procedure 47 4

Cases:

Johnson v. Smith, 24 Or App 621, 546 P2d 1089 (1976) . 7

Oberg v. Honda Motor Company, 316 Or. 263, 851 P.2d 1084 (1993) 3, 4, 9, 11

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. , 111 S.Ct. 1032 (1991) 8, 9

State ex rel Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980) 5

TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (June 25, 1993) 8-11

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of Oregon, (Petition at A-1) is reported at 121 Or. App. 25, 853 P.2d 1350. The Supreme Court of Oregon denied a petition for review, which was unreported.

JURISDICTION

The Supreme Court of Oregon denied petition for review on September 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

STATEMENT

The summary of the relevant facts of this case provided by petitioner has been overgeneralized as well as painted in a light wholly in favor of petitioners' position and in a manner inconsistent with the evidence presented at trial by the respondents, Dan and Virginia Eulrich.

Contrary to the petitioners' view, both the jury and the Oregon Court of Appeals found that Snap-On and its employees had engaged in aggravated fraudulent conduct with respect to their relations with respondents, Dan and Virginia Eulrich, from the inception of that relationship in which they fraudulently induced the Eulrichs into becoming Snap-On Tool distributors, throughout the

duration of the relationship when the evidence showed Snap-On, acting through its employees, coerced a purported release from Dan Eulrich in a high pressure meeting terminating the distributorship.

The Petitioners' statement that the respondents only suffered an out-of-pocket loss of $10,000 (Petition at 3) is wholly unsupported by the evidence and is consistent with petitioners' continual mischaracterization of the facts throughout this proceeding.

As was explained in detail in the Court of Appeal's opinion, the evidence showed that the Eulrichs were fraudulently induced to enter into a Snap-On Tool distributorship with petitioners as a part of Snap-On's nationwide scheme whereby the company routinely and regularly recruits naive, unexperienced and unsuspecting individuals into investing substantial sums of money into distributorships utilizing a consistent pattern of misrepresentations. These representations include false representations of the amount of income Snap-On Tool distributors can expect to earn, false reporting of expenses Snap-On distributors can expect to incur in operating a distributorship, omissions with respect to failure rates, false representations as to the amount of customers which will be in a distributor's territory, misrepresentations about the marketing, support and financial expertise which would be given dealers, etc. The evidence at trial was overwhelmingly against petitioners, and supported the respondents' position that the recruitment of the Eulrichs was an overall part and parcel of the nationwide scheme engaged by Snap-On Tools to expand its dealer network in order to

substantially increase its profits. This expansion was done without concern for whether these newly acquired distributors could survive financially given the significantly reduced territories they were "awarded." As a result of these practices, the evidence at trial showed that numerous dealers who were fraudulently induced to invest their life savings, or significant portions of their estates into these distributorships, failed in their distributorship businesses, causing them significant hardship and grief.

The financial damages to the Respondents herein totalled over $450,000, which damages have been affirmed by the Oregon appellate courts. A more complete history of the petitioners' pattern and practice of fraud and misrepresentation is contained in the opinion of the Court of Appeals which appears in the appendix to the Petition for Writ of Certiorari.

RESPONSE TO REASONS FOR GRANTING THE WRIT

I. PETITIONERS' ARGUMENTS WERE NOT PROPERLY RAISED AT THE TRIAL COURT

At the outset respondents respectfully submit that petitioners' overbroad statement that the Oregon Constitution prohibits judicial review of punitive damages is simply an incorrect statement of Oregon law. This statement ignores Oregon case law on the issue and particularly an in-depth opinion rendered by the Oregon Supreme Court in the case of *Oberg v. Honda Motor Company*, 316

Or. 263, 275 et. seq., 851 P.2d 1084 (1993)[1]. Such a statement by petitioners, however, typifies their consistent practice of mischaracterizing law and fact throughout this case.

A punitive damage claim and ultimate award can be reviewed at several places in the proceeding in Oregon. Initially, a party seeking punitive damages must be able to plead in good faith operative facts giving rise to a claim for punitive damages. Trial judges in the State of Oregon have wide latitude to strike punitive damages claims at the pleading stage for failure on the part of a party to be able to plead the requisite operative facts.

Thereafter, during the pre-trial phase, after discovery is closed, a party opposing punitive damages may ask a trial judge to strike the punitive damage claim based upon the failure of the claimant to elicit evidence of sufficiently aggravated conduct to allow the issue of punitive damages to go to trial. This may be done in a motion for summary judgment under the Oregon Rule of Civil Procedure 47.

Thereafter, at trial a plaintiff, under Oregon law, must present by clear and convincing evidence a prima facie case to establish that there is a factual basis for his punitive damage claim. Or. Rev. Stat. 41.315(1). In other words, the claimant must present evidence of sufficiently aggravated conduct to justify an award of punitive

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[1] A Petition for Writ of Certiorari in the *Oberg* case has been filed, No. 93-644. Respondents herein concur in and adopt the arguments made in the Respondent's Brief in Opposition in the *Oberg* case.

damages to punish and deter the defendant and others. *State ex rel Young v. Crookham*, 290 Or. 61, 65, 618 P.2d 1268 (1980). It must be shown by the clear and convincing evidence standard, not a mere preponderance of the evidence standard, that there is a prima facie case of fraud or other misconduct entitling that party to proceed ahead with the punitive damage claim. Thus, a trial judge may, after hearing evidence presented by a punitive damage claimant, rule that the evidence is not substantial enough to allow the plaintiff to proceed forward with his punitive damage claim. It is incumbent upon the trial judge not to permit the punitive damage claim to be submitted to a jury without the prima facie showing mentioned above.

Thereafter, assuming the evidence is sufficient to persuade the trial judge that punitive damages may be appropriate in the case, the amount of punitive damages to be submitted to the jury can be controlled by the trial judge based upon the amount of actual damage proven by the claimant. Thus, if a claimant has only shown actual damages of a few thousand dollars, a trial judge would have within his discretion the power to limit punitive damages which he would allow to go to the jury.

The second stage at which a punitive damage award can be reviewed is after the verdict on appeal. It is true that the review of a punitive damage award on appeal is limited by the Oregon Constitution, however this limitation is no greater than that which applies to any damage award returned by a jury. As petitioners

correctly point out at pages 2 and 3 of the Petition, there is post-trial review of punitive damage awards both as to trial court error and for a determination by the appellate court whether there is any evidence in the record to support the verdict. This standard requires that there be some substantial evidence in the record to support the verdict, including the amount thereof. Thus, substantial due process review of punitive damage awards in Oregon does exist, despite the petitioners' assertion to the contrary.

Starting with their initial complaint, respondents alleged their right to punitive damages of $2.5 million on each of the two relevant claims. Petitioners never moved the trial court to reduce the amount of the punitive damages claims, or otherwise lessen the amount as being inconsistent with the respondents' proof of actual damages. Petitioners moved for a directed verdict, but only on the ground that there was no evidence to support any punitive damages, but not on the ground that the amount was excessive.

The petitioners did not argue that the amount of punitive damages prayed for was excessive, even when the respondents moved, at the end of the evidence, to double their prayer for punitive damages. The petitioners argue to this Court that Oregon law deprives them of an opportunity to have the punitive damage award reviewed for excessiveness, but they did not make this argument at the only time when the trial court could have granted them the relief they now seek, that is, prior to the jury being instructed. In fact, the petitioners have conceded that the jury was

properly instructed, and this includes the instruction that the jury could award up to nine million dollars in damages.

Only after the verdict was received and punitive damages awarded did the petitioners file a motion for judgment notwithstanding the verdict, claiming for the first time that the amount of the punitive damages claimed and awarded was excessive. In that motion they alleged, as one ground for relief, that the award of punitive damages "denied defendants due process of law."

Oregon Rule of Civil Procedure 63A provides that a motion for a judgment notwithstanding the verdict cannot be granted when the party has not made a motion for a directed verdict on the same ground for which it seeks a judgment n.o.v. *Johnson v. Smith*, 24 Or. App. 621, 624, 546 P.2d 1089 (1976).

Thus the petitioners did not timely raise their objections to the excessiveness of the claim for and award of punitive damages. Because petitioners did not ask the trial court to limit the amount of the punitive damages claim submitted ot the jury, they thereby failed to avail themselves of the most important procedure available in Oregon for protection against excessive punitive damage awards, and should not be now heard to complain of the award.

II. EVEN IF THE ARGUMENT HAD BEEN PROPERLY RAISED, OREGON'S PUNITIVE DAMAGE LAWS ARE CONSTITUTIONAL

If this Court should decide to consider petitioners contentions despite petitioners' failure to timely assert them, their arguments are

nevertheless unfounded.

The crux of petitioners' argument is that Oregon law violates this Court's opinions in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993). Petition, page 5. Petitioners argue that "excessiveness can only be reviewed after a jury verdict," and that *TXO* therefore requires "adequate post trial review." *Id.*

As discussed in the section above, this argument is wrong on two counts. First, excessiveness can be reviewed and controlled at several stages before the verdict by motions to limit the amount of (or completely eliminate) the claim for punitive damages. Petitioners failed to avail themselves of these procedures.

Second, there is post-trial review of the amount of the punitive damages award in that there must be some evidence in the record to support the award, including the amount thereof. Petitioners could have received this review by the Oregon Court of Appeals and the verdict was affirmed.

Petitioners are making essentially the same argument they made at the Oregon Court of Appeals before this court decided *TXO*. There they argued that "[u]ntil the United States Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032 (1991), it was settled law in Oregon * * * that a verdict for punitive damages could not be set aside for excessiveness and was not reviewable. * * * In *Haslip* the Court prescribed constitutional standards for punitive damages that Oregon law, constrained by Article VII, Section 2 (Am.) does not meet."

Appellants' Reply Brief, page 14.)

The flaw in this argument is that *TXO* did not announce any new standard of review for punitive damages; in *TXO* this Court followed *Haslip*. In *Oberg v. Honda Motor Co.*, 316 Or 263, 275 et. seq, 851 P2d 1084 (1993), the Oregon Supreme Court held in a thorough opinion that the Oregon procedures for reviewing punitive damages awards were consistent with the requirements of *Haslip*. Further, as noted above, petitioners admit that the instructions which were given were "constitutionally sufficient." (Appellants Reply Brief, page 14, n.8.)

Therefore, Oregon's laws and procedures relating to the award of punitive damages are consistent with the Due Process Clause and this Court's opinions in both *Haslip* and *TXO*, and the petitioners' arguments to the contrary should be rejected and the writ denied.

III. THE PUNITIVE DAMAGE AWARDS WERE NOT EXCESSIVE

Finally, in actual fact, this punitive damage award was not excessive in relation to the compensatory damage award, and under the standards announced by this Court.

On the fraud claim, the jury awarded $100,000 in compensetory damages and $4,750,000 in punitive damages; for the breach of the covenant of fair dealing it awarded $100,000 compensatory damages and $3,700,000 punitive damages. This is a ratio of 47.5 to 1 punitive damages to compensatory on the first claim, and 37 to 1 on the second claim. In *TXO Production Corp. v. Alliance Resources*

Corp., supra, the case upon which petitioners rely to reverse this case, a majority of this Court upheld a verdict of $19,000 compensatory damages and $10,000,000 punitive damages, a ratio of 526 to 1.

Justice Stevens, writing for three of the Justices in *TXO*, was of the opinion that the punitive damages were not excessive because of the "potential harm that might result from the defendant's conduct" as well as the harm actually incurred; the "possible harm to other victims;" and that petitioner's conduct was "part of a larger pattern of fraud, trickery and deceit." As noted above, and in the Court of Appeals decision, there was ample evidence of this conduct in the present case.

Justice Kennedy concurred that the punitive damages were not excessive because "TXO acted with malice." There was evidence in the instant case that the petitioners "acted with malice." Justice Scallia, joined by Justice Thomas, was of the opinion that there is no substantive due process requirement that punitive damages be reasonable.

There was ample evidence in the instant case to support similar findings against the petitioners herein.

IV. CONCLUSION

In conclusion, the factual picture painted by the petitioners in their Petition for Review is very different from the actual facts of this case. The petitioners' fraud was intentional, a general pattern and practice of their business, and clearly supported the award of

punitive damages. The petitioners further failed to properly preserve the arguments they are now making against the punitive damage awards. Even if those arguments had been preserved, they are not persuasive. Contrary to petitioners' arguments this Court in *TXO* did not change the law which existed at the time of the Oregon Supreme Court's decision in *Oberg*, and that court approved a punitive damage award much greater (in relation to the compensatory damages) than that made in the instant case.

Indeed, it is temerarious of petitioners to seek this review in light of the *Oberg* opinion, which dealt squarely with these issues in a responsible, analytical and perceptive manner, mindful of this honorable Court's recent pronouncements.

Therefore the Petition for Writ of Certiorari should be denied.

Dated: December 14, 1993

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-697

In The

Supreme Court of the United States

October Term, 1993

SNAP-ON TOOLS CORPORATION, TIM KASH, and RAY PARK,

Petitioners,

v.

DAN EULRICH, VIRGINIA EULRICH, and DEPARTMENT OF JUSTICE OF THE STATE OF OREGON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Oregon

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioners Snap-on Tools Corporation[1], Tim Kash and Ray Park briefly reply to Respondents' Brief in Opposition as follows:

Supposed Pre-Trial Procedures. Citing no statutes or case law, Respondents contend that Oregon's system satisfies due process because a court, upon a pre-verdict motion, can eliminate any punitive damages claim not supported by "substantial" evidence and can cap the amount that a jury can eventually award. (Resp. Br. at 5.) No such rules exist in Oregon. If, upon a pre-verdict motion, a court finds that evidence exists to support a finding of the misconduct necessary for a punitive damages award, the issue must be submitted to the jury for whatever amount the plaintiff has requested. *Young v. Crookham,* 618 P.2d 1268, 1274 (Or. 1980). This is just a normal summary judgment/directed verdict standard. Moreover, the pre-verdict procedures relied on by Respondents have nothing to do with determining whether the amount actually awarded is excessive.

Supposed Post-Trial Review. Respondents suggest that, post-trial, an Oregon court will set aside the amount of a punitive damages award if the amount is not supported by "substantial evidence." (Resp. Br. at 6.) Again, no statute or case cite is provided for this view. The actual rule in Oregon is that a punitive damages award must be upheld by the courts if there is any evidence to show the misconduct required for such an award. *See, e.g., Webster*

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[1] Snap-on Tools Corporation has no parent company and no subsidiaries that are not wholly-owned.

v. Dieringer's Variety, Inc., 734 P.2d 402, 405 (Or. App. 1987). The amount of the award can never be reviewed to determine if it is excessive. *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949).

Waiver. Whether the punitive damages award is excessive is an issue that can only exist after the jury has rendered its verdict. Petitioners raised the issue in a timely post-trial motion. (*See* Petition at A-46 to A-50.) The courts below did not accept Respondents' waiver argument and even Respondents conceded, in their brief filed with the Oregon Supreme Court, that petitioners had not waived the issue of whether the award was excessive.

Non-Excessiveness. Respondents' argument that the award was not excessive under due process standards misses the point. The Court does not have before it any lower court ruling that the award was reasonable because all lower courts refused to hear the issue. The issue before the Court is whether Respondents were entitled to be heard on the issue of excessiveness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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